Owe Then Kooi v Au Thiam Seng & Anor

Development & Commercial Bank Bhd v Au Thin Chai & Ors (Owe Then Kooi, Intervener)

HIGH COURT (IPOH) — CIVIL SUIT NO 22-24-86 AND ORIGINATING SUMMONS NO 31-319-86
ABDUL MALEK J
30 SEPTEMBER 1989

Land Law — Dealings — Indefeasibility — Fraud — Transfer effected by fraud of transferee — Charge effected in favour of innocent third party — Foreclosure action — Remedies — Position of transferor — Position of chargee — Damages — Whether adequate remedy to transferor — National Land Code 1965, s 340

There were two actions, one a suit brought by one Owe Then Kooi against his half-brother, Au Thiam Seng, and a bank, and the other a foreclosure action brought by the bank against Au Thiam Seng and five others, all of whom were the registered owners of a piece of land charged to the bank. Owe Then Kooi was later joined as an intervener in the bank's action. It was Owe Then Kooi's case that he was the registered owner of a 1/7 undivided share of the land and that Au Thiam Seng had fraudulently caused to be effected the transfer of Owe Then Kooi's share to Au Thiam Seng. The six defendants in the bank's action had charged the land to the bank as security in respect of credit facilities granted by the bank. Owe Then Kooi was sent to prison on 3 August 1979 following his conviction of an offence. When sent to prison, he had asked Au Thiam Seng to hold his 1/7 share in the land in trust for him until he had completed his sentence. Au Thiam Seng told him that he would get a lawyer to prepare the necessary documents. In prison, Owe Then Kooi signed some documents brought by a lawyer's clerk thinking that they were for the purpose of Au Thiam Seng taking the 1/7 share to be held in trust for him. Being conversant only in Chinese, he did not know the contents of the documents which were in English. Following his release from prison, he went to see Au Thiam Seng who gave him the sum of $4,350 purportedly being his share of the rentals paid in respect of the land and due to him. Owe Then Kooi did not suspect anything until he received a notice from the Inland Revenue regarding real property gains tax levied on the disposal of his 1/7 share. It transpired that Au Thiam Seng had caused the 1/7 share to be transferred to himself. Owe Then Kooi went to see Au Thiam Seng who told him that he had made a mistake and would transfer the 1/7 share back to him.

Held, giving judgment to the plaintiff in the first action and dismissing the bank's action:

(1) Au Thiam Seng had effected the transfer of Owe Then Kooi's share to himself fraudulently. His payment of the rental arrears and the subsequent arrears was only his attempt to delay the discovery of the fraud by Owe Then Kooi, and his subsequent charging of the property in collaboration with the other co-owners, his disappearance from the scene when the instant proceedings were instituted, and his non-appearance during the hearing, only cemented the fact that he had in fact acted fraudulently.

(2) Owe Then Kooi had not been guilty of negligence in not discovering the fraud earlier then he did.

(3) Au Thiam Seng's title to the 1/7 share was defeasible. The title to the property reverted to Owe Then Kooi but the interest, namely, the charge, remained vested in the bank. It would be disastrous to find a subsequent innocent chargee to have a better right than the defrauded registered proprietor who was not a party or privy to any of the situations that made the title or interest defeasible. As between them, if the charge was held to be valid, the position would be that the chargee acquired only an interest in and not a title to the land and the registered proprietor of the charged land can in fact further sell the land to a third party who will take it subject to the registered lease or charge. It was not appropriate to order that only damages be paid to Owe Then Kooi for the fraudulent act committed by Au Thiam Seng and that the bank be allowed to proceed with its action, especially when Owe Then Kooi was not a party to the fraud. This view was supported by the fact that Au Thiam Seng had disappeared and Owe Then Kooi would not be able to get any form of damages from him and would be left with neither any monetary compensation nor the 1/7 share already charged to the bank.

[*Editorial Note*: The second defendant in Civil Suit No 22-24-86 has appealed to the Supreme Court vide Civil Appeal No 02-346 of 1989. The plaintiff in Originating Summons No 31-319-86 has appealed vide Civil Appeal No 02-348 of 1989.]

Cases referred to

1 *District Bank Ltd* v *Luigi Grill, Ltd & Ors* [1943] Ch 78 (refd)
2 *Public Finance Bhd* v *Narayanasamy* [1971] 2 MLJ 32 (refd)
3 *Quah Hong Lian Neo* v *Seow Teong Teck & Ors* [1936] MLJ 203 (refd)
4 *Gibbs* v *Messer* (1891) AC 248 (refd)

Legislation referred to

Land Enactment 1910 ss 59, 83, 90H
National Land Code 1965 s 340

Paramjit Singh for the plaintiff in Civil Suit No 22-24-86 and the intervener in Originating Summons No 31-319-86.
Viswanathan for the second defendant in Civil Suit No 22-24-86 and the plaintiff in Originating Summons No 31-319-86.

Cur Adv Vult

Abdul Malek J: These appeals are against my decision in:

(a) giving judgment as prayed for by the plaintiff in Ipoh High Court Civil Suit No 22-24-86 (hereinafter 'the civil suit') against the first and second defendants; and
(b) dismissing the plaintiff's application to foreclose the property charged by the six defendants in Ipoh High Court Originating Summons No 31-319-86 (hereinafter 'the originating summons').

The appeals are by the second defendant in the civil suit who is also the plaintiff in the originating summons. The plaintiff in the civil suit is also the intervener in the originating summons while the first defendant in the civil suit is the third defendant in the originating summons. The plaintiff in the civil suit had not filed the action against the second defendant but the latter had applied to be made a party in the matter in view of the originating summons. By consent, the two matters had been heard together but for ease of reference, in view of the different capacities of all parties in the two actions, I shall refer to

them by their capacities in the civil suit unless for obvious reasons, the originating summons need to be referred to.

In the civil suit, the plaintiff had prayed for the following (the italics is to indicate the subsequent amendments):

(a) a declaration that the transfer dated 28 December 1979 vide Presentation No 3464/80 jilid 1332 folio 55 in respect of the said undivided 1/7 share of the land *formerly* held under grant for Land No 5738 lot no 139N mukim Ulu Kinta/town of Ipoh *is now held under Geran No 11765 lot no 139N Bandar Ipoh* whereon is erected shophouse bearing No 10, Jalan Panglima, Ipoh from Owe Then Kooi the plaintiff to Au Thiam Seng the defendant *is* null and void;

(a) (i) *a declaration that the inclusion of the said undivided 1/7 share of the said land aforesaid in Charge Presentation No 12713/84 jilid 1699 folio 26 dated 19 June 1984 is also null and void*;

(b) an order that the defendant *and/or the applicants above-named* do deliver forthwith the said document of title *Geran No 11765 lot no 139N Bandar Ipoh* to the plaintiff above-named or his solicitors *Maxwell Kenion Cowdy & Jones, No 31, Jalan Bandar Raya, 30000 Ipoh to enable them to vest the said undivided 1/7 share of the land aforesaid in the name of the plaintiff herein*;

(c) an order that the said undivided 1/7 share presently registered in the name of Au Thiam Seng aforesaid in the land *now known as Geran No 11765 lot no 139N Bandar Ipoh* be vested in the name of Owe Then Kooi (NRIC No 0603528 (Blue)), the plaintiff above-named;

(d) an order that the Registrar of Titles Perak, Ipoh do make the necessary memorials in the register document of title and the issue document of title so as *to* vest the said undivided 1/7 share aforesaid in the land held under *Geran No 11765 lot no 139N Bandar Ipoh* in the name of Owe Then Kooi (NRIC No 0603528 (Blue)), the plaintiff above-named;

(e) an order that the defendant *and the applicants* do pay to the plaintiff the costs of and expenses incidental to the registration of the said undivided 1/7 share in the land held under *Geran No 11765 lot no 139N Bandar Ipoh* in the name of Owe Then Kooi (NRIC No 0603528 (Blue)), the plaintiff above-named;

(f) damages;

(g) costs;

(h) further or other relief.

In the originating summons, the plaintiff is asking for the following orders:

(a) that the land held under Grant for Land No 5738 for lot no 139N in the town of Ipoh in the State of Perak be sold by public auction for the realization of the sum of $618,496.41 due to the plaintiff as at 16 February 1986 under Charge Presentation No 12713/84 vol 1699 folio 26 together with further interest calculated as follows:

(1) 16.75%pa on monthly rests on $540,000 from 17 February 1986 till date of satisfaction and 18%pa on monthly rests on the amount exceeding the limit of $540,000 from 17 February 1986 till date of satisfaction;

(2) 19.25%pa on monthly rests on $29,411.66 from 17 February 1986 till date of satisfaction;

(b) that the said sale be held on a date to be fixed by this honourable court or as soon as may be thereafter;

(c) that the date of sale, reserve price, conditions of sale and all other matters necessary and proper for carrying out the order of sale be referred to the registrar of the honourable court with all powers of court to fix and settle the same;

(d) that the plaintiff be allowed to bid at the sale and in the event of their being declared the purchaser to set off the purchase price against the moneys due to them under the aforesaid charge;

(e) that the costs of and incidental to this application and of the sale be taxed as between party and party and be paid by the defendants to the plaintiff out of the proceeds of the said sale.

The plaintiff and the fourth defendant in the originating summons are brothers, while the first, second and third defendants in the originating summons are their stepbrothers, the fifth defendant in the originating summons their stepsister and the sixth defendant in the originating summons their stepmother respectively and they had each been given a 1/7 share in Chee Loy & Co (hereinafter 'the company'). On 4 June 1984, the six defendants in the originating summons had charged the property for $540,000 in respect of overdraft facilities and, together with the trust receipts/letters of credit for $30,000 and the purchase of outport cheques also for $30,000, the amount came to $600,000. The advocate and solicitor who attested the charge (DW1) had told the court that he had made a search at the Land Office and had discovered that the property belonged to the six defendants in the originating summons who all had 1/7 share each except for the first defendant who had 2/7 share. There had also been a prior charge to Public Bank but that had been discharged prior to this charge. At the time of the attestation, DW1 testified that none of the six defendants in the originating summons had told him that any one else had a share in the property. He also gave evidence that only the fourth

defendant in the originating summons had come on 4 June 1984 and the others had come one or two days earlier but for conveyancing convenience, the last date of attestation had been entered on the charge for all the six defendants in the originating summons.

The plaintiff (PW1) had told the court that he and the first defendant had the same father but different mothers. He added that he used to own 1/7 share of the property along with the six defendants in the originating summons. On 3 August 1979, he was charged for murder but when the charge was reduced to culpable homicide he had pleaded guilty and was sentenced to four years' imprisonment. On 4 December 1979, the High Court by way of revision had increased that sentence to 12 years and it was because of this extended prison sentence that he had told the first defendant, who was present in court, that he wanted to withdraw from the business and had asked the first defendant to hold his 1/7 share in trust until he had completed his 12-year sentence. The first defendant had then told him that he would get a lawyer to prepare the necessary documents.

When the plaintiff was brought back to the Central Police Station lockup, an Indian clerk had seen him with some documents for signing, stating that he was sent by the first defendant's lawyer. PW1 said that he signed those documents without knowing the contents in English as he was only conversant in Chinese. He denied receiving $22,142 at the time of signing as stated in the document and believed that the document was to give the first defendant his 1/7 share in trust.

In the meantime, the Federal Court had reduced his 12-year jail sentence by the High Court back to four years and he was released on 3 April 1982. He immediately went to see the first defendant to ask for his 1/7 share. The first defendant had then told him that he was entitled to the 1/7 share and all the rentals due to him while he was serving sentence amounting to $4,350. At that time, and since the first defendant continued to pay him the rentals, the plaintiff did not suspect anything until January 1986 when he received his income tax notice when real property gains tax was levied on the disposal of his 1/7 share. The plaintiff then went to see the first defendant who told him that he had made a mistake and would transfer it back to the plaintiff. This he did not do until the action was filed. The plaintiff is also not aware of the first defendant's whereabouts even at the date of the hearing.

The manager of the second defendant (DW2) at the Jalan Jelapang Branch, Ipoh at the relevant time gave evidence that the company, with the six defendants in the originating summons as partners, had opened an account with the second defendant and had applied for overdraft facilities, trust receipts and overdraft facilities against outstation cheques and had offered the company premises at 10 Jalan Panglima, Ipoh as security. On checking, DW2 had discovered that the six defendants were registered owners and that the title was charged to the Public Bank. The valuers had then valued the property at $800,000. DW2 also stated that the plaintiff also had an account with the second defendant but he did not know that the plaintiff had a 1/7 share in the property charged or that his share had been fraudulently transferred, in which case he said he would not have accepted the charge.

In the circumstances, I was of the considered view that I should first decide as regards whether the plaintiff's 1/7 share in the company had been fraudulently transferred to the first defendant who had subsequently, with the other remaining defendants in the originating summons, charged the property to the second defendant, which finding would certainly affect the validity of the charge. In the absence of the first defendant during the proceedings, I was left with the version of the plaintiff and the second defendant and the evidence gathered from the relevant documents.

It is not disputed that the plaintiff had been sentenced to four years' jail on 3 August 1979 which was increased on revision by the High Court on 4 December 1979 to 12 years. This was, however, again reduced to four years by the Federal Court. In consequence, the plaintiff was released from prison on 3 April 1982. He had given his 1/7 share in the company on 4 December 1979 in trust to the first defendant in view of his 12-year prison sentence and when he was in the Central Police lockup, an Indian clerk from the first defendant's lawyer had come to ask him to sign the necessary documents.

It is pertinent to note that the plaintiff does not understand English and, in view of what the Indian clerk said, was under the impression that the document was indeed a trust document for his 1/7 share. It is also relevant to note that the document he signed was in fact a transfer document giving away his 1/7 share to the first defendant for $22,142. The plaintiff was adamant that he had received no money and there was definitely no lawyer who was present to attest to all these details either at the lockup or subsequently at the Taiping prison although the document stated that it was attested by an advocate and solicitor by the name of Tang Khai Khit. The plaintiff evidently was totally unaware of this whole charade and proceeded to serve his sentence. Even after his release, he was still in this state of ignorance as when he immediately approached the first defendant, he was assured that everything was in order and the first defendant had in fact two days after his release given him the rental arrears of $4,350 to cover the $150 monthly rentals for the 29 months he was in jail and had subsequently continued to give him the monthly rentals.

It is ironical to observe that the first defendant did not actually charge the property with the other defendants in the originating summons while the plaintiff was serving

sentence but some two years after the plaintiff's release, namely, in June 1984 while the plaintiff was still in the era of oblivion as regards the document he had signed in December 1979. The plaintiff had only become aware in January 1986 as a result of the real property gains tax notice. When he approached the first defendant, the latter had admitted that it was a mistake and had promised to put things right but obviously did nothing about it which had resulted in the present proceedings.

On these facts, I could come to no other conclusion but to hold that the first defendant had effected the transfer of the plaintiff's 1/7 share to him fraudulently. His payment of the rental arrears and the subsequent arrears was only his attempt to delay the discovery of the fraud by the plaintiff, and his subsequent charging of the property with the other defendants in the originating summons, his disappearance from the scene when these proceedings were instituted, and his non-appearance during the hearing, only cements the fact that he had in fact acted fraudulently. I also held that on these facts, the plaintiff had proven his case beyond reasonable doubt and not only upon a balance of probabilities. Acting in concert with him, or at least carrying out his practice in a negligent manner, would only be the advocate and solicitor who attested to the transfer document. The fact that the advocate and solicitor was never present while the plaintiff was in custody is amply borne out by the prison visitors' records.

It had been argued that the plaintiff was also responsible for the situation that he found himself in in that he was guilty of negligence and that he did nothing on discovery of the matter like lodging a caveat on the property. I found no substance in this argument as the plaintiff was quite ignorant of the document he had signed, otherwise he would not have signed it, coupled with the fact that the first defendant had sent the lawyer's clerk immediately on the same day to attend to the plaintiff's problem thus convincing the plaintiff that the document was actually in accordance with his request and instructions. After his release, the plaintiff continued to be unaware in view of the first defendant's payment of the rental arrears and current rentals. It was only when he got the real property gains tax notice in early 1986 that he was made aware and after getting an assurance from the first defendant that the mistake of transfer would be rectified but in fact was not, the plaintiff had immediately filed the civil suit.

In the circumstances, however, there is no evidence to suggest that the second defendant was a party to the fraud as because of the fraudulent transfer from the plaintiff, no one would have been able to detect any hanky panky as regards the title to the shares in the company. I therefore found that the plaintiff had proved his case against both defendants but on the plaintiff's own subsequent contention that there was no collusion between the first and second defendants and since I had ruled that the second defendant did not in fact collude with the first defendant, I ordered that the first defendant bear all costs of the second defendant in the proceedings. I also found no necessity to award damages in favour of the plaintiff in view of the fact that he was getting his 1/7 share back.

In consequence of this finding, I had then to determine whether the plaintiff in the originating summons had a right to apply as he did for the foreclosure of the property. In this regard, I had to consider the provisions of s 340 of the National Land Code 1965 [hereinafter 'the Code'] as to whether the plaintiff in the originating summons as chargee fell under the proviso to sub-s (3) as coming under the category of a 'purchaser in good faith and for valuable consideration' and whether they were protected as chargee under sub-s (4)(a).

At the appendix C glossary of the *National Land Code — A Commentary* by Judith E Sihombing, the author had stated that the term 'purchaser' is not limited to those who acquire the estate but refers also to lessees, chargees and the like. In *District Bank, Ltd* v *Luigi Grill Ltd & Ors*[1] the court had made an observation that although 'a purchaser' refers to transactions between vendors and purchasers, it would include a mortgagee. The decision in that case, however, centred on the problem as to whether an action will lie at the suit of a mortgagee against the mortgagor or his solicitor for failing to disclose any instrument or incumbrance material to the title. It was held that no action lay in the absence of proof of intent to defraud.

In *Public Finance Bhd* v *Narayanasamy*,[2] the respondent/chargor had purchased a large piece of land with a view to reselling sub-divided portions thereof and had executed a charge over 187 acres to secure the repayment of $440,000 to the appellant/chargee which knew as a fact that the charged land had been fragmented and over 100 acres thereof resold to sub-purchasers, who had gone into possession of their respective areas upon part payment of approximately 4/7 of the purchase price. The appellant/chargee subsequently applied to court for an order of sale of the whole of the 187 acres charged to them to recover the principal and interest due to them. They opposed the intervention by the sub-purchasers and the learned trial judge found that they were guilty of fraud and collusion and dismissed their application. On appeal, the Federal Court held that the appellant/chargee's insistence that the sub-purchasers had no rights whatsoever, except a right to damages against the chargor for breach of contract, was so plainly unconscionable that the trial judge was justified in holding that they were guilty of fraud and collusion. Accordingly, they were of the view that 'they (the chargee) cannot claim the same protection as purchasers for value without notice'. Learned counsel for the second defendant here had argued that this dictum did not

mean that bona fide chargees for value without notice can never claim the same protection as purchasers for value without notice. He added that the facts there were distinguishable from this case as there is no evidence that the chargee here had any knowledge of the said fraud.

In *Quah Hong Lian Neo* v *Seow Teong Teck & Ors*,[3] the facts were that the original plaintiff, Tan Keng Neow was the executrix and devisee in trust of Seow Eng Tin, deceased and, as such, was registered as proprietor and representative of the lands comprised in Johore Grants 12364 and 12365. The first defendant obtained possession of the titles by a trick. He procured a woman to impersonate Tan Keng Neow and to execute a forged transfer of the lands to himself. Immediately thereafter he, purporting to act as the registered proprietor, executed a first charge in favour of the second defendant to secure advances on current account. Thereafter this transfer and first charge were registered. Subsequently the first defendant executed a second charge to the second defendant to secure further advances, and this charge was also registered. The first defendant then executed a third charge to the third defendant to secure advances on current account. Thereafter this transfer and first charge were registered. The first defendant absconded. The second defendant proved that he had given value for his charge bona fide and without notice of the fraud. The third defendant did not prove that he had given value for his charge bona fide and without notice of the fraud. Possession of the property remained with the original plaintiff. The original plaintiff, having discovered the frauds, brought a suit claiming, inter alia, to have the forged transfer and the three charges declared void as against her and set aside and to have the register rectified. She died during the hearing, and the suit was carried on by her successor, the substituted plaintiff. It was held that the plaintiff was entitled to succeed as the 'fraud', referred to in the concluding clause of s 59 of the Land Enactment 1910, against which the court has jurisdiction to relieve, is not confined (as it is in s 90H) to fraud to which the purchaser is proved to be a party. The forged transfer to the first defendant was a nullity following the case of *Gibbs* v *Messer*.[4] As the first defendant obtained no rights by virtue of the forged transfer, he had no rights, by reason of the maxim nemo dat quod non habet, to hand on to the chargees.

Therefore the charges were nullities, at any rate so far as they affected the land supposed to be charged. On a true construction of s 59 of the Land Enactment 1910, the land did not pass to the chargor, notwithstanding the registration of the forged transfer. That transfer, being a forgery, was not an 'instrument' and no title under s 59 could arise out of it. If, however, the land did pass under s 59, the court held that, in exercising its jurisdiction in fraud, it ought to prefer the equity of the plaintiff as being prior in time to the equities of the second and third defendants. The second and third defendants could not rely on the legal estate because, even if it be assumed that registration of the charges was equivalent to getting the legal estate in unregistered land, the chargor here had no title and, in such a case, the legal estate would only afford protection if clothed with possession. The court was also of the view that a grant in Johore does not confer an indefeasible title on the grantee and that it depended on the terms of the enactment how far the legislature intended that people shall be able to rely on the register. The court found that the Johore enactment was not modelled closely on the Australian Torrens Acts and substantially differed from them. In particular, except in the case of court sales under s 83 and s 90H, it was of the opinion that the enactment contained no provision conferring indefeasibility of title or State warranty of title.

The facts in that case are somewhat similar to the facts of the present case and I was of the view that I should hold that there cannot be a valid transfer of the title to the chargee as one of the chargors had perpetrated a fraud on the actual owner of the 1/7 share. As it is, the involvement of the other five co-owners remains hazy as none were present to give evidence during the trial.

However, this case was decided long before the Code came into force and we can only rely on it on the principles enunciated. I have not been able to locate any case authority affecting the Code based on the facts similar to this case. It is therefore necessary to refer to s 340 of the Code in its proper sequence.

Subsection (1) of s 340 of the Code reads:

> The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

On the facts of this case at the time of hearing, this would include the first defendant, who is registered as proprietor and the second defendant, who is registered as chargee. Their title or interest, 'subject to the following provisions of this section', is therefore indefeasible. The plaintiff is not covered at this point of time as he is no longer on the register as the registered proprietor.

Subsection (2) of the said section provides:

> (2) The title or interest of any such person or body shall not be indefeasible —
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

In the instant case, the first defendant had been found by the court to have perpetrated the fraud and so he falls

under para (a). The second defendant is not affected in the circumstances. The first defendant's title has therefore become defeasible. It is also pertinent to note that paras (b) and (c) are not relevant to our present problem.

Under sub-s (3), the relevant section states:

> Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
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> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

I would interpret this to mean that once it is found that the title or interest is defeasible under any of the situations specified in sub-s (2), namely, fraud as in this case, the title or interest may be set aside by any person or body to whom it may subsequently be transferred or in whom it is subsequently vested. 'Subsequently' must mean after the event of the fraud and in our present situation, it is the second defendant in whom the interest is subsequently granted under para (b). However, the wording in paras (a) and (b) would seem to suggest that the person or body has first to apply to set aside the defeasibility resulting from any of the circumstances set out in sub-s (2) and it is not a question of the normal course of events taking place and the title or interest falling automatically into the hands of that person or body without any formal application.

The proviso to the subsection, however, raises another problem. 'Purchaser' has been defined as 'any person or body who in good faith and for valuable consideration acquires title to, or any interest in land'. 'Acquire' has not been defined under the Code but the person or body acquiring interest would certainly include the chargee. The only snag is whether the proviso is intended to mean, in view of paras (a) and (b) before it, that if the title or interest is acquired by the purchaser, including the chargee, in good faith and for valuable consideration, that purchaser need not have to apply to set aside the title or interest already found to be defeasible and it would automatically go to the purchaser, or does it mean that the acquisition by a purchaser in good faith and valuable consideration of the title or interest as the second defendant here would still have to make a formal application, but the title or interest would automatically be transferred or vested in the purchaser without the necessity of any arguments on the merits at the hearing.

The problem of the proviso is relevant in our circumstances as the second defendant, as plaintiff in the originating summons, had applied to foreclose the property charged by the first defendant and the other five co-owners. They had not applied to set aside the title or interest of the first defendant as such, and naturally so, as they were probably not aware of the fraud at the time of filing their application in view of their subsequent application to be made a party in the civil suit. Therefore, if the second defendant fell under the first limb of the interpretation of the proviso, they need not make any formal application and the court would have to grant an order in terms of their application. What, then, would be the position of the plaintiff who had got back the title by reason of the fraud?

I am inclined to hold that the proviso to sub-s (3) eliminates the necessity of the purchaser in good faith and for valuable consideration applying to set aside the defeasibility and it follows that from the facts of the present case, the title to the property had reverted to the plaintiff but the interest remains vested in the second defendant. This would mean that I should have granted order in terms for the second defendant's application as plaintiff in the originating summons to foreclose the property. I may have been in error here but, to my mind, it would be disastrous to find a subsequent innocent chargee to have a better right than the defrauded registered proprietor with the title who was not party or privy to any of the situations that made the title or interest defeasible in the light of *Quah Hong Lian Neo*'s case.[3] As between them, even if the charge is held to be valid, the position would be that the chargee acquired only an interest in and not a title to the land and the registered proprietor of the charged land can in fact further sell the land to a third party who will take it subject to the registered lease or charge.

In the result, I found it not appropriate to order that only damages instead be paid to the plaintiff for the fraudulent act committed by the first defendant and to allow the plaintiff in the originating summons to proceed with the foreclosure action, especially when the plaintiff was not a party or privy to the fraud. This is compounded by the fact that the first defendant has disappeared and the plaintiff would not be able to get any form of damages from him and would therefore be left with neither any monetary compensation nor the 1/7 share already charged to the second defendant.

I accordingly gave order in terms of the plaintiff's application with both the plaintiff's and the second defendant's costs to be borne by the first defendant and dismissed the application of the plaintiff in the originating summons with each party to bear their own costs.

Order accordingly.

Solicitors: *Paramjit & Co; Kean Chye & Sivalingam.*

Reported by *PS Ranjan*